IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
PRESIDING JUDGE SERVITTO

ROBERTO LANDIN,

Plaintiff-Appellee,

v.

HEALTHSOURCE SAGINAW, INC.,

Defendant-Appellant

Supreme Court No. 149663

Trial Court No. 08-002400-NZ-3

Court of Appeals No. 309258

_____/

BRIEF ON APPEAL - DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

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OPINION AND ORDER APPEALED FROM AND RELIEF SOUGHT

Defendant/Appellant Healthsource Saginaw ("Healthsource") seeks reversal of the Michigan Court of Appeals' June 3, 2014 Published Opinion and Order (the "Published Opinion") (Appx. 8),[1] *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519; 854 NW2d 519 (2014), affirming the Saginaw County Trial Court's Opinion and Order denying Healthsource's Motion for Summary Disposition pursuant to MCR 2.116(C)(10). Healthsource also seeks reversal of those portions of the Published Opinion that affirm the trial court's denial of Healthsource's Emergency Motion for Summary Disposition, denial of Healthsource's motion for JNOV, new trial and/or remittitur.

The Saginaw County Trial Court entered its Opinion and Order denying Healthsource's Motion for Summary Disposition as to Plaintiff's public policy wrongful discharge claim on September 14, 2010 (Appx. 1). In its ruling, the Saginaw County Trial Court failed to identify any objective legislative source for Plaintiff's public policy wrongful discharge claim. On October 13, 2011, the Saginaw County Trial Court issued an Order that identified, for the first time, the purported legislative source of Plaintiff's public policy claim: the Public Health Code (Appx. 3). Healthsource filed an immediate Emergency Motion for Summary Disposition, which the Saginaw County Trial Court denied on October 14, 2011 (Appx. 4).[2] But the Court of Appeals nevertheless affirmed the Saginaw County Trial Court, finding that it reached the right result for the wrong reason, even though it acknowledged that the Saginaw County Trial Court

[1] Saginaw County Trial Court Opinions, Court of Appeals Opinions, Trial Transcripts and Exhibits and Unpublished Cases are attached to this brief and cited as "Appx. ____." (MCR 7.302(A), 7.309 and 7.311).

[2] After trial, a judgment was entered against Healthsource on November 9, 2011 and a post-trial Motion for Judgment Notwithstanding the Verdict, Or, Alternatively, For New Trial or Remittitur was Denied by the Saginaw County Trial Court. (Appx. 6, 7).

made its own "judgment call" and never applied controlling Michigan Supreme Court precedent.

Healthsource asks the Michigan Supreme Court to reverse the decisions of the Court of Appeals and the Saginaw County Trial Court, grant either of Healthsource's Motions for Summary Disposition, or grant Healthsource's Motion for JNOV and determine that, Plaintiff may not maintain a wrongful discharge claim for violation of public policy under MCL 333.20176a(1)(a) because under *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002), *Suchodolski v Michigan Consol Gas Co*, 412 Mich 692; 292 NW2d 880 (1982), and *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993), Plaintiff has no valid public policy wrongful discharge claim. Healthsource further asks this Honorable Court to determine that the Whistleblowers' Protection Act, MCL 15.361, *et seq*, provides the exclusive remedy for a claim of wrongful discharge under MCL 333.20176a(1)(a) and 333.20180(1). The Michigan Supreme Court's jurisdiction over this matter is pursuant to its April 3, 2015 Order granting Defendant-Appellant's Application for Leave to Appeal (Appx. 9).

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER A PLAINTIFF MAY MAINTAIN A WRONGFUL DISCHARGE CLAIM FOR VIOLATION OF PUBLIC POLICY UNDER MCL 333.20176a(1)(a)?

Court of Appeals Would Answer: Yes
Trial Court Would Answer: Yes
Plaintiff/Appellee Would Answer: Yes
Defendant/Appellant Would Answer: No

II. WHETHER THE WHISTLEBLOWERS' PROTECTION ACT, MCL 15.361, ET SEQ, PROVIDES THE EXCLUSIVE REMEDY FOR A CLAIM OF WRONGFUL DISCHARGE UNDER MCL 333.20176a(1)(a) AND 333.20180(1)?

Court of Appeals Would Answer: No
Trial Court Would Answer: No
Plaintiff/Appellee Would Answer: No
Defendant/Appellant Would Answer: Yes

I. INTRODUCTION

This case concerns the fundamental jurisprudential question of whether Michigan courts are permitted to create public policy wrongful discharge claims that they believe serve the public good, in the absence of a Legislative act or statute providing a basis for such claims, and where the creation of those claims undermines established Michigan Supreme Court precedent, the doctrine of employment at-will in Michigan and Legislative intent. A public policy discharge claim **cannot** be based upon a violation of the Public Health Code because the Legislature – the sole decider of public policy in the State of Michigan – has determined that the ***exclusive*** remedy for violation of the Public Health Code, MCL 333.20176a, is the Whistleblowers' Protection Act, MCL 15.361, *et seq.*

The Court of Appeals' Published Opinion contravenes Legislative intent, and in so doing exercises power exclusively reserved to the Legislature. It essentially guts prior Supreme Court precedent, which has definitively confirmed that only the Legislature can create public policy, and is in derogation of controlling authority holding that public policy wrongful discharge claims are valid under only very limited and rare circumstances that are not present here. This alone requires reversal of the Court of Appeals' Published Opinion. But there is more. Allowing the Court of Appeals' Published Opinion to stand will embolden other courts to follow a similar path, open the floodgates to the assertion of public policy wrongful discharge claims every time a discharged employee believes his or her termination is unfair, and will have the effect of nullifying the at-will employment doctrine in Michigan, which the Michigan Supreme Court has carefully sought to preserve in its post-1980 decisions.

In *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002), the Supreme Court reined in the ability of lower courts to create or identify public policies that individual judges thought were worthy of furtherance, or from general considerations of supposed public interests. There, the

Michigan Supreme Court ruled that only the Legislature may create Michigan's public policy, that public policy "must be more than a different nomenclature for describing the personal preferences of individual judges," and that the judiciary's focus must be on policies that have, in fact, been adopted through legal processes and are reflected in the state and federal constitutions, statutes and common law.

The Michigan Supreme Court also set forth the applicable standard for public policy wrongful discharge claims in *Suchodolski v Mich Consol Gas Co*, 412 Mich 692; 316 NW2d 710 (1982). At the outset, *Suchodolski* reiterated that the common law is that all employment is at-will unless there is a just-cause contract between the employee and employer that affirmatively changes at-will status. In other words, *Suchodolski* did not create at-will employment, it merely recognized that at-will employment is the default position under the common law unless the employer and employee modified that position by contract. Next, *Suchodolski* recognized that the Legislature can limit the power of employers to carry out at-will terminations, and that employers who violate legislatively-created public policy, such as discharging employees in violation of civil rights statutes, can be sued for wrongful discharge. It is into this regime that *Terrien* injects the further clarification that only the Legislature has the authority to say what conduct violates public policy.

Violating these precedents, the Court of Appeals' Published Opinion found a valid claim of discharge in violation of public policy based upon a the Public Health Code (MCLA 333.20176a) even though the Legislature has already determined that the exclusive remedy under that statute is the Whistleblowers' Protection Act. See *Parent v Mount Clemens Gen Hosp*, 2003 WL 21871745, *3 (No 235235) (Mich App August 7, 2003) (Appx, 51); Legislative History of Section 20176 and 333.20180 (Appx. 57). The ruling is especially concerning where, Plaintiff did not actually engage in protected activity covered by section 20176a of the Public Health

Code. As a matter of law, a public policy discharge claim may not be based upon a statute that provides specified rights and its own remedy. *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993). The Court of Appeals' Published Opinion also violates the rule of *Smith v. Globe Life*, 460 Mich 446; 597 NW2d 28 (1999) – *i.e.*, when the Legislature has defined an exclusive remedy barring other claims, as it has here, plaintiffs and judges cannot creatively re-label a claim to avoid the result that the Legislature intended. As such, Plaintiff cannot repackage or apply a creative label to his claim by calling it a report of "malpractice," and therefore not a report under the Public Health Code, simply to circumvent the Legislature's determination that, under these circumstances, no public policy wrongful discharge claim exists. Based on *Dudewicz* and *Smith*, Plaintiff cannot pursue a claim under the Public Health Code because he admits, and the Court of Appeals found, that he did not engage in protected activity, and because he did not file his Complaint within the six-month time limit governing whistleblower claims.

The Court of Appeals' Published Opinion moves the state of the law back into the world created by *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980), which allowed virtually every termination to be challenged in a lawsuit, and which has been de-fanged by the Michigan Supreme Court over the past twenty-five years. As with *Toussaint*, the Court of Appeals' Published Opinion means that every terminated employee, armed with a clever lawyer who is good at deriving ad hoc public policy that might catch the eye of a lower court judge, could obtain a successful wrongful discharge jury verdict. Such a legal regime has the potential to be an economic body blow to Michigan's always fragile business climate, just as *Toussaint* was thirty four years ago. If, as a state, we are going to adopt this approach, then, as in *Henry v The Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005), where the Supreme Court was invited to create an equally-destabilizing medical monitoring

doctrine, the Supreme Court ought to direct this Plaintiff to take his theory to the Legislature. The Legislature has the ability to determine just what the costs of this new approach will be to jobs and growth, and to determine if it is worth doing notwithstanding the costs. Courts are poorly-suited to such evaluations, as *Toussaint* made clear. In short, if the people of the State of Michigan want to visit these consequences on their job providers, so be it, but it is wise for this Court to recognize, as in *Henry*, that it is best done not in a court but after a full and fair debate in the Legislature.

Here, the Court of Appeals' Published Opinion erroneously held that Plaintiff, a Licensed Practical Nurse who claimed he was terminated for internally reporting the alleged negligent actions of a coworker, could assert a wrongful discharge public policy claim. The Court of Appeals concluded that the Michigan Public Health Code provided a statutory basis for Plaintiff's public policy claim, notwithstanding that the Court of Appeals acknowledged that the Public Health Code already provided a remedy for discharged employees (the Whistleblowers' Protection Act), and that Plaintiff did not even act in accordance with the conduct the Public Health Code ostensibly protects. Although the Court of Appeals cited to and recognized the relevant standards in *Terrien* and *Suchodolski*, it failed to apply them. Instead, it erroneously engaged in the weighing of public policy considerations, arguing that protecting healthcare employees who report alleged coworker malpractice "is of at least equal if not of greater" significance than benefitting and protecting victims of work-related injuries. In so doing, the Court of Appeals engaged in precisely the type of identifying priorities, weighing of the relevant considerations and choosing between competing alternatives that courts are not permitted to do. *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999).

The Court of Appeals' Published Opinion flies in the face of *Terrien, Suchodolski Dudewicz*, and *Smith* and by virtue of its mistaken rationale and ruling, along with its status as a

Published Opinion, it places those decisions and at-will employment at risk of being undone. *Terrien* cut down drastically on the potential creators of public policy, whose declarations of what public policy is would trump the common law. It is this narrowing that the Court of Appeals' Published Opinion attacks by expanding the number of potential public policy "creators" to include judges. The Opinion so hollows out *Terrien* that the bar is likely to conclude that *Terrien* has effectively been overruled, and it may act as a signal that lower courts can challenge or chip away at superior precedent. By awarding Plaintiff a public policy claim where he already had a statutory one provided by the Legislature by relabeling with different words, and where no such wrongful discharge claim existed at common law, the Court of Appeals also ignored, issued a ruling contrary to and *de facto* overruled *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993), *Pompey v General Motors Corp*, 385 Mich 537, 552-53; 189 NW2d 243 (1971) and their progeny as well as *Smith v. Globe Life*, 460 Mich 446; 597 NW2d 28 (1999).

The Published Opinion at issue here can readily be cited by future litigants as support for public policy claims where none should exist, or have ever existed. If left unchecked, the Court of Appeals' Published Opinion will serve as the entry point for a legal system where at-will employment – and not public policy claims – becomes the exception, not the rule. The Court of Appeals' Published Opinion requires correction to avoid "unforeseen and undesirable consequences" associated with its startling departure from "bedrock legal rules" and established Supreme Court precedent. *See* Young, *A Judicial Traditionalist Confronts The Common Law*, 8 Texas Rev. L. & Pol. 299, 305-310 (2004).

For all of the foregoing reasons, Defendant-Appellant Healthsource Saginaw most respectfully requests that this Court: reverse the Published Opinion of the Court of Appeals and the Saginaw County Trial Court, grant either of Healthsource's Motions for Summary

Disposition, or grant Healthsource's Motion for JNOV and determine that, under *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002), *Suchodolski v Michigan Consol Gas Co*, 412 Mich 692; 292 NW2d 880 (1982), and *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993), Plaintiff has no valid public policy wrongful discharge claim and that the Whistleblowers' Protection Act is the exclusive remedy for plaintiffs who are discharged in violation of the Public Health Code, MCL 333.20176a.

II. STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. STATEMENT OF PROCEEDINGS BELOW

1. The Saginaw County Trial Court Denied Healthsource's April 26, 2010 Motion For Summary Disposition Pursuant To MCR 2.116(C)(10)

On April 26, 2010, Healthsource filed a Summary Disposition Motion pursuant to MCR 2.116(C)(10). Healthsource cited controlling case law outlining the *prima facie* elements of a public policy discharge claim pursuant to *Suchodolski v Mich Consol Gas Co,* 412 Mich 692; 316 NW2d 710 (1982), and argued that the undisputed facts and law demonstrated that: (1) Plaintiff had not stated under which *Suchodolski* exception his claim fell; (2) Plaintiff could not establish he was discharged in violation of an explicit legislative statement prohibiting termination of employees acting pursuant to the statute; (3) Plaintiff could not establish he was terminated for failure or refusal to violate the law; (4) Plaintiff could not establish he was discharged for exercising a right conferred by a well-established legislative enactment; (5) controlling case law holds that there is no public policy claim based upon the reporting of suspected coworker misconduct to a supervisor; (6) none of the well-established legislative enactments identified by Plaintiff, including the Public Health Code, could serve as a basis for a public policy discharge action under controlling law; (7) Plaintiff could not establish that his internal complaint was the significant factor in his termination; and (8) Plaintiff's claim that

another employee was treated differently could not establish a *prima facie* public policy claim. (Appx. 12, pp. 52a-64a).

The Saginaw County Trial Court denied Healthsource's Motion, incorrectly concluding that no Michigan Court has determined whether an internal report of coworker misconduct creates a public policy cause of action. (Appx. 1, pp. 3a-4a). To reach this conclusion, the Saginaw County Trial Court decided to make its own "**judgment call**," did not apply Michigan law, bypassed several on-point federal court decisions indicating that Plaintiff had no claim, and instead relied solely on inapposite out-of-state cases, including the dissenting opinion of a Supreme Judicial Court of Massachusetts decision where the majority affirmed the dismissal of a public policy claim identical to Plaintiff's. *Id.* pp. 4a-7a (emphasis added). Having done so, the Saginaw County Trial Court, contrary to *Suchodolski*, held that an internal report of suspected misconduct can form the basis of a public policy claim. Demonstrating that it was engaged in the creation of public policy, which is the sole province of the Legislature, the Saginaw County Trial Court stated:

> To hold that Landin has no claim against the Defendant, is in essence, to hold that no good deed shall go unpunished. That cannot be the law. *Id.* p. 7a.

The Saginaw County Trial Court never applied *Suchodolski*, did not determine under which at-will employment exception Plaintiff's public policy claim allegedly fell, and did not state which statute provided Plaintiff with an actionable public policy claim. The Saginaw County Trial Court also concluded that Plaintiff had presented evidence that the internal report was the significant factor his discharge. *Id.* p. 29a.[3]

[3] Healthsource filed an application for leave to appeal this order (Court of Appeals No. 300522), which was denied 2-1. (Appx. 2).

2. The Saginaw County Trial Court Issued A Ruling Five Days Before Trial Holding That The Michigan Public Health Code Provided A Statutory Basis For Plaintiff's Public Policy Claim

During the submission of proposed jury instructions prior to trial, Healthsource argued that neither Plaintiff, nor the Saginaw County Trial Court, had ever identified the statutory basis of Plaintiff's public policy discharge claim and that, consequently, that basis must be an element of Plaintiff's burden of proof at trial. (Appx. 13, p. 67a). Healthsource's proposed initial instructions also included that Plaintiff had to prove that his internal report was a significant factor in his discharge and that Healthsource's stated reason for the discharge was false. *Id.* Defendant also submitted non-standard jury instructions outlining the scope of public policy discharge claims, including instructions pointing the Trial Court for a second time to controlling law holding that neither internal reports of co-worker misconduct nor the Public Health Code could serve as the basis of a public policy claim. *Id.* pp. 66a-67.a.

Plaintiff submitted a non-standard instruction regarding his public policy discharge claim. *Id.* p. 67a. Plaintiff argued that the Jury should be instructed that the elements of his claim should be based on the Public Health Code. *Id.* Defendant reminded the Trial Court for the third time that the exclusive remedy under the Public Health Code's anti-retaliation provision is the Whistleblowers' Protection Act. *Id.*

Five days before trial – for the first time – the Saginaw County Trial Court ruled that "as a question of law properly to be decided by it, Michigan law recognizes a cause of action for wrongful termination in violation of public policy exhibited by [the Public Health Code] MCL §333.20176a(1)(a)." (Appx. 3). The Saginaw County Trial Court did not identify any authority supporting its finding. The Saginaw County Trial Court also instructed the jury that Plaintiff had to show he "made a good faith report to his employer, Healthsource, that he believed that a co-

worker acted in a negligent or incompetent manner, and posed a danger to Healthsource patients." (*Id.*; see also Appx. 14, p. 69a).

3. The Trial Court's Denial Of Healthsource's October 13, 2011 Emergency Motion For Summary Disposition

In response to the Court's erroneous ruling, issued five days before trial, that the Public Health Code supported a public policy discharge claim, Healthsource filed an Emergency Motion for Summary Disposition, pointing out to the Trial Court – for the fourth time – that binding precedent stated that the Whistleblowers' Protection Act was the exclusive remedy under the Public Health Code. The Court denied Defendant's Motion because there was "no adequate time prior to trial for counsel" to respond to the motion and "the Court will not entertain a summary disposition motion at the eleventh hour." (Appx. 4).[4]

4. The Court Of Appeals' June 3, 2014 Published Opinion Affirming The Saginaw County Trial Court's Rulings In All Respects

The Court of Appeals fully recognized that the Saginaw County Trial Court denied Healthsource's Summary Disposition Motion pursuant to MCR 2.116(C)(10) without identifying any specific law or public policy that would support Plaintiff's cause of action. It noted, however, that the Saginaw County Trial Court, in a subsequent Order, stated that it was holding, as a matter of law, that Michigan law recognizes a cause of action for wrongful termination in violation of public policy exhibited in a section of the Michigan Public Health Code. (Appx. 8).

The Court of Appeals' Published Opinion acknowledged that Michigan law generally presumes that employment relationships are terminable at the will of either party, recited the applicable standards for public policy wrongful discharge claims in *Suchodolski v Michigan*

[4] Healthsource filed an Emergency Application for Leave to Appeal and Motion for Immediate Consideration of Order Denying Summary Disposition (Court of Appeals No. 306570), which was denied. (Appx. 5).

Consol Gas Co, 412 Mich 692; 316 NW2d 710 (1982), correctly identified the three narrow exceptions to the presumption of at-will employment under which a public policy claim must fit and observed that the Michigan Supreme Court has never expanded upon those three narrow exceptions. *Id.*, pp. 21a-22a. The Court of Appeals' Published Opinion also referenced the Michigan Supreme Court's decision in *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002). *Id.*, p. 22a.

Having correctly set forth this jurisprudential framework, however, the Court of Appeals then neglected to apply it. Compounding this error, the Court of Appeals took an extraordinarily forgiving view of the Saginaw County Trial Court's decisions to: make its own "judgment call," ignore controlling Michigan law, fail to articulate whether Plaintiff's claim fell under any exception under *Suchodolski*, and rely on non-Michigan cases to justify its decision denying Healthsource's Motion for Summary Disposition. Notwithstanding this, the Court of Appeals presumed that the Saginaw County Trial Court found that Plaintiff's wrongful discharge public policy claim fell under Exception 1 (*i.e.*, an explicit legislative statement prohibited the discharge of employees who act in accordance with a statutory right or duty) or Exception 3 (*i.e.*, the reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment). Ultimately, the Court of Appeals' Published Opinion concluded that denial of Healthsource's Motion was appropriate because the Michigan Public Health Code provided a statutory basis for Plaintiff's public policy claim. *Id.*, p. 23a.

In reaching this conclusion, the Court of Appeals cited to MCL 333.20176a, a portion of the Michigan Public Health Code, as the basis for Plaintiff's claim. That section states that a health facility or agency shall not discharge or otherwise discriminate against an employee if the employee reports or intends to report, verbally or in writing, the malpractice of a health professional. The Court of Appeals reasoned that employees asserting public policy wrongful

discharge claims under the first *Suchodolski* exception may do so pursuant to the Public Health Code, MCL 333.20176a, just as they may do so under the Michigan Whistleblowers' Protection Act and the Michigan Elliott-Larsen Civil Rights Act. *Id.*, p. 24a.

The Court of Appeals' decision ignores the fact that each of those statutes, including MCL 333.20176a, already incorporates a remedy granting aggrieved employees a private right of action under the Whistleblowers' Protection Act, and that under controlling Supreme Court precedent, there is no other remedy. *Dudewicz, supra*.

Although the Court of Appeals acknowledged that the only situation to which *Suchodolski* Exception 3 has been applied is the termination of an employee in retaliation for filing a worker's compensation claim, it engaged in a weighing of policy considerations and concluded that protecting employees who internally report coworker malpractice is a public policy worth developing and promoting:

> The workers' compensation statutes and MCL 333.20176(a) share the same underlying purpose-- to promote the welfare of the people in Michigan as it concerns health and safety. While the workers' compensation statutes were admittedly enacted specifically in the context of protecting employees who are injured in the workplace, **it could be argued that** reporting malpractice in the context of a medical workplace would have even more of a direct impact on the health and welfare of our citizens and that the right to report alleged malpractice in one's workplace without fear of repercussion **is of at least equal if not of greater significance** than benefitting and protecting victims of work-related injuries. (emphasis added).

Id., p. 25a (emphasis added). The Court of Appeals also rejected Healthsource's argument that the Legislature specifically incorporated the Whistleblowers' Protection Act as the exclusive remedy for violations of MCL 333.20176a, concluding that it did not apply because "plaintiff did not originate a report or complaint of a violation of the Public Health Code…." *Id.*, p. 26a. In other words, the Court of Appeals concluded that although Plaintiff never reported or intended to

report a violation of the Public Health Code, the Code could nevertheless serve as the basis for his public policy wrongful discharge claim.

The Court of Appeals in this case has issued a Published Opinion that cannot coexist with established Michigan Supreme Court precedent announced in *Terrien*, *Suchodolski*, and *Dudewicz* because it usurps the Legislature's authority to create public policy, throws settled at-will employment law into a state of upheaval and will invite terminated employees who believe they've been treated unfairly to initiate public policy wrongful discharge lawsuits, so long as they can identify a single statute that bears only a tangential relationship to the alleged reason for their terminations, and even where they did not act in accordance with that statute. In short, if it is allowed to stand, the Court of Appeals' Published Opinion will *de facto* result in the overturning of carefully considered prior Michigan Supreme Court precedent.

5. The Michigan Supreme Court's April 3, 2015 Order Granting Defendant-Appellants Application For Leave To Appeal

On April 3, 2015, this honorable Court granted review of the Court of Appeals' Published Opinion by granting Healthsource's Application for Leave to Appeal. (Appx. 9). This Court limited the issues on appeal to whether "the plaintiff may maintain a wrongful discharge claim for violation of public policy under MCL 333.20176a(1)(a)," asking the parties to include a discussion of "whether the Whistleblowers' Protection Act, MCL 15.361 *et seq*, provides the exclusive remedy for a claim of wrongful discharge under MCL 333.20176a(1)(a). See MCL 333.20180(1)" (*Id.*).

B. UNDERLYING FACTS

1. Healthsource Saginaw

Healthsource is a not-for-profit municipal health organization that provides medical care for about 300 patients at its extended, behavioral medicine and medical rehabilitation centers.

(Appx. 15, pp. 72a-73a; Appx. 17, pp. 107a-108a). Healthsource hired Plaintiff as a Licensed Practical Nurse (LPN) in March 2001. (Appx. 15, p. 72a). LPNs care for people who are sick or injured under the direction of physicians and registered nurses. (Id., p. 73a). They administer prescription medication and provide basic bedside care. (Appx. 20). Amber Boyk, who had been working for Healthsource since 1999, supervised Plaintiff. (Appx. 17, p. 107a).

2. Healthsource's Medication Administration Policy

Healthsource maintains detailed procedures for medication administration in its nursing manual that are created by a nursing executive committee. (Appx. 19, p. 131a). The medication policy requires someone who administers medication to "d. Be sure medicine has been swallowed before leaving [the] room**.**" (Appx. 21, p. 142a). The Policy also requires nurses to certify on a chart that the medication was given, who administered the medication and when the patient took it. *Id.*, p. 143a. The Policy cautions "Never sign for or initial medication ahead of time in the medication notebook." (*Id.*, p. 145a; see also Appx. 17, pp. 113a-114a).

Signing a Medication Administration Record before watching the patient swallow medication is falsification because the signature is an affirmative statement that the medication has been given to the patient. (Appx. 17, p. 114a; Appx. 19, pp. 131a – 132a). This practice is dangerous because nurses can be distracted by events occurring on the floor and forget if the medication was given. *Id.* Further, subsequent nurses who review the chart and see that medication has been signed out will presume the medication has been given to the patient.[5] *Id.* Intent is not a factor in falsification. (Appx. 19, p. 136a). Healthsource's Disciplinary Policy confirms that falsification of medical records may result in immediate termination. (Appx. 22, p.

[5] In contrast, failing to sign out medication – even though it was properly administered – is not falsification because there was no false certification and the subsequent nurse will follow up if the medication record is not filled out. (Appx. 17, pp. 114a-115a; Appx. 19, pp. 132a-133a).

146a; Appx. 19, p. 132a).[6] The Policy also dictates that when a nurse is alerted to a medication variance, s/he must report that problem by filling out a variance/concern worksheet and reporting to the manager in charge. (Appx. 17, p. 113a; Appx. 23). Plaintiff admits that he received these policies, knew what they required, and knew that falsification could lead to termination. (Appx. 15, pp. 77a, 80a, 91a, 93a-94a).[7] Failure on Healthsource's part to follow these policies could result in citation from the State, prohibiting Healthsource from taking new admissions or disqualifying it from Medicare reimbursement programs. (Appx. 19, pp. 132a-133a).

3. Plaintiff's Serious And Continuing Performance Problems

Plaintiff's performance issues began nearly two years before his termination and continued to that date:

- **November 1, 2004:** Plaintiff was suspended for insubordination when he refused to work rounds on the second shift. (Appx. 25; Appx. 15, pp. 79a-80a, 91a-92a).

- **February 2, 2005:** Plaintiff was coached and counseled by supervisor Amber Boyk for an inappropriate interaction with a patient's family member. Boyk also emphasized the importance of assessment and medical documentation; as well as the need for Plaintiff to maintain professionalism with his coworkers. (Appx. 15, p. 79a).

- **April 22, 2005:** Plaintiff was disciplined for failing to properly handle a patient's request for medication. As a result, Healthsource had to call in a pharmacist to dispense the medication after hours. (Appx. 26; Appx. 15, p. 92a).

- **July 6, 2005:** Plaintiff was counseled for failing to report a bruise of unknown origin on a patient's lip in violation of the policy requirement to report patient injuries. (Appx.

[6] Like any employer, Healthsource reserves the right to change its disciplinary policies, enforce measures of discipline in its discretion and provide notice of those changes to its employees. (Appx. 17, p. 115a). Discipline is not administered arbitrarily. (Appx. 16, p. 102a).

[7] Despite this testimony, Plaintiff alleges he routinely signed medication out before administering it while in the Psychiatric Unit. (Appx. 15, p. 82a). According to Nurse Executive Sue Graham, this practice is not permitted and, if it had happened and she had become aware of it, it would have been swiftly stopped. (Appx. 19, p. 135a). In any event, in July 2004 Plaintiff was moved off the psychiatric unit onto Unit 5A, where he admits that his supervisor, Amber Boyk, never gave him permission to continue falsifying medical records as he allegedly did in the Psychiatric Unit. (Appx. 15, p. 88a; Appx. 29).

27; Appx. 15, pp. 79a, 92a).

- **August 12, 2005:** Plaintiff was counseled for incurring his 5th unscheduled absence. (Appx. 28; Appx. 15, pp. 79a, 92a).

- **January 27, 2006:** Plaintiff received written counseling for violating the Sexual Harassment Policy. (Appx. 29; Appx. 15, p. 93a; Appx. 17, p. 116a).

Plaintiff agrees he could have been terminated for these incidents. (Appx. 15, pp. 91a-93a). He also admits to routinely violating the medication administration policy by initialing the Medication Administration Record before entering the patient's room 25–30% of the time. (Appx. 15, p. 98; *supra*, note 7).

4. Plaintiff's Suspension For Falsifying Medical Records And Failing To Provide Two Patients With Respiratory And Anti-Seizure Medication

On March 1, 2006, a patient's family member complained that Plaintiff failed to provide a scheduled respiratory medication. (Appx. 30; Appx. 15, p. 95a; Appx. 18, p. 124a). The complaint was made to the nurse following Plaintiff's shift, Gayle Johnson, who advised the family member that she would have to inform a supervisor. (Appx. 15, p. 83a; Appx. 17, p. 121a; Appx. 18, p. 124a).[8] The patient's Medication Administration Record stated that Plaintiff had signed out the medication.

On March 2, 2006, just one day later, Plaintiff again falsified medical records when he failed to give anti-seizure and Parkinson's medications to a patient but falsely documented that he had done so. (Appx. 15, pp. 84a, 95a). The patient's family member complained to the incoming nurse, Gayle Johnson, who checked the Medication Administration Record, noting that Landin's initials indicated the medication had been given. (Appx. 18, pp. 124a-125a; Appx. 17,

[8] Patients complain all the time and it is natural for patients who are unhappy with the care they are receiving to complain to the nurse on the next shift; Gayle Johnson followed Plaintiff's shift. (Appx. 17, p. 118a; Appx. 18, p. 124a; Appx. 19, p. 135a).

p. 121a). Johnson then called the supervisor, Mary Reynolds, who opened the medication cart and discovered pills in the cart that had not been administered. (Appx. 18, pp. 124a-125a).

During an interview regarding the March 1 and March 2 incidents, Plaintiff admitted he falsely certified he had administered the medication. (Appx. 30; Appx. 15, pp. 83a, 95a; Appx. 17, p. 115a). Plaintiff blamed the March 1 incident on the patient (Appx. 15, p. 83a) and the March 2 incident on a nurse who promised to give the medication after Plaintiff hurriedly left work for school. (Appx. 15, p. 84a). Notwithstanding his excuses, Plaintiff admits his behavior violates policy and could have led to immediate termination. (Appx. 22; Appx. 15, pp. 95a-96a; Appx. 17, p. 116a; Appx 18, p. 129a; Appx. 19, pp. 132a, 136a). Plaintiff also admits that Healthsource gave him another chance, suspending him for five days, and warning him that any further instances of poor performance could result in discipline, up to and including discharge. (Appx. 30; Appx. 15, pp. 95a-96a; Appx. 17, p. 116a; Appx. 18, p. 129a).

5. Plaintiff's Discharge For A Third Instance Of Medical Record Falsification

Within two months of his five-day suspension for medical record falsification and failure to administer medication, Plaintiff engaged in the very same conduct again. On April 23, 2006, Plaintiff was caring for a patient named "Scott," who had recently suffered a seizure. (Appx. 31-31). Plaintiff admits he signed the Medication Administration Record, attesting that he watched Scott swallow his anti-seizure medication. (Appx. 15, p. 81a). Later, Scott complained to the next incoming nurse, Gayle Johnson, that he had not received his medication. (Appx. 18, p. 125a; Appx. 31-32). Scott also complained to his physician, Dr. Ali, who asked Johnson why Scott was not given his medication. (Appx. 18, p. 125a; Appx. 31-32). Johnson checked the Medication Administration Record, confirming that the record indicated Plaintiff had signed out Scott's medication. (Appx. 15, p. 96a; Appx. 18, pp. 123a, 125a). Johnson then notified a

supervisor, Mary Reynolds, and opened the medication cart, noticing it contained the anti-seizure pills that should have been given to patient Scott. (Appx. 18, p. 125a). Johnson called a second supervisor to look at the pills. *Id.* Dr. Ali examined the circumstances and instructed Nurse Johnson to give Scott his anti-seizure medication. (Appx. 18, pp. 125a-126a; Appx. 31-32).

Amber Boyk, Plaintiff's supervisor, investigated the circumstances surrounding patient Scott's complaint, concluding that: (1) Plaintiff had initialed the Medication Administration Record, indicating that he had given patient Scott the anti-seizure medication; (2) Scott's medication was found in the medication cart; (3) Scott confirmed in an interview that he did not receive his anti-seizure medication from Plaintiff; (4) the attending physician, Dr. Ali, interviewed the patient, who stated that Plaintiff did not give him his medication; and (5) Boyk interviewed the patient, who reiterated that Plaintiff did not give him his medication. (Appx. 31-33; Appx. 17, pp. 116a-118a; Appx. 18, pp. 128a-129a).[9]

Despite his two admitted instances of falsification, Plaintiff again blamed the patient, stating that Scott could not be trusted because he is disabled. (Appx. 15, pp. 85a, 98a). When asked how he expected Healthsource to believe him when he just admitted to falsifying records twice in the previous month, Plaintiff responded, "Oh, I see what you're getting at … I guess I can understand your reasoning." (Appx. 15, p. 97a). Plaintiff also blamed Gayle Johnson, alleging that she placed the pills in the cup herself and reported it to get back at Plaintiff for a

[9] Additional evidence establishes that Healthsource's investigation reached a reasonable conclusion: (1) Scott had never before (or after) complained about not receiving his medication (Appx. 17, p. 117a); (2) there was no evidence suggesting that Scott suffered from adverse effects typically associated with receiving a double-dose of anti-seizure medications (Id.); and (3) Plaintiff conceded that, on prior occasions, he had falsified patient Scott's medical records by initialing the medication administration record before actually providing medication to Scott. (Appx. 15, p. 98a). Patient Scott's medical records contain no diagnosis of memory problems. (Appx. 17, pp. 117a-118a).

report Plaintiff made about her two months earlier. (Appx. 15, pp. 85a-86a). Plaintiff's only evidence for this conspiracy theory was his gut feeling. (Id., p. 97a).

After consulting with Human Resources ("HR"), Boyk terminated Plaintiff on April 28, 2006 for his falsification of patient medical records. (Appx. 34; Appx. 17, pp. 109a, 118a; Appx. 18, pp. 128a-129a; Appx. 19, pp. 133a-134a). Boyk's reasons for terminating Plaintiff are reflected in a contemporaneous written document which states:

> [t]his is to inform you that upon conclusion of the investigation, we have found that you did not adhere to the facility's Nursing Policy…specifically the procedure on documentation of treatment…. This is a Healthsource Saginaw Group I work rule violation, specifically #1, '*Falsification, alteration, or deliberate omission of information on the application for employment, application for leave of absence, medical records, or any other HSS record.*' (Appx. 34).[10]

6. Plaintiff's False Allegations Regarding Coworker Gayle Johnson

On February 25, 2006, Landin publicly accused a fellow nurse, Gayle Johnson, of causing a patient's death. The 73-year-old patient, "Jack," passed away on February 25 at 5:45 a.m. He had a history of obesity, was a heavy smoker, and had a tumor of the central nervous system, heart disease, diabetes, and gangrene. (Appx. 38; Appx. 15, pp. 74a-75a). Plaintiff filed a "Variance/Concern" report accusing Johnson of killing Jack. (Appx. 39; Appx. 17, p. 120a).[11] When Boyk received the document, she called Plaintiff to discuss his concerns and to inquire

[10] Under the Public Health Code, Healthsource Saginaw must report employee terminations to the Michigan Bureau of Health Professions. See MCL § 333.16222. Pursuant to this duty, Healthsource Saginaw reported Plaintiff's termination to the Bureau. (Appx. 35; Appx. 19, pp. 133a-134a). On September 15, 2006, the Michigan Bureau of Health Professions issued an administrative complaint against Plaintiff. (Appx. 36). The Bureau alleged that Plaintiff falsely stated that he had provided patients with medication, and held a hearing on April 24, 2007. The ALJ found that Plaintiff admitted he deliberately falsified patient medical records on March 1 and March 2, 2006. (Appx. 37, pp. 173a-175a). The ALJ also concluded that Plaintiff's conduct violated the Public Health Code. (Id., p. 176a; Appx. 15, pp. 99a-100a).

[11] Despite claiming he believed Johnson was dangerous, Plaintiff simply slid the report under his supervisor Amber Boyk's door, knowing that Johnson would work two full shifts before Boyk would even see the report. (Appx. 15, p.p. 78a, 98a-99a; Appx. 17, pp. 109a-110a).

about whether the patient's family had any concerns so that Healthsource could respond. (Appx. 17, pp. 109a-110a; Appx. 18, p. 128a).[12]

Boyk immediately investigated the allegations. As Plaintiff's concerns were clinical, Human Resources did not lead the investigation.[13] (Appx. 18, p. 128a). After gathering information from the appropriate clinicians, Boyk concluded that Johnson had followed orders given to her by Physician Assistant Lindsey, no evidence demonstrated that Johnson had not received the order, and the possibility of malpractice litigation simply was not a factor in Boyk's determination. (Appx. 16, pp. 103a-106a; Appx. 17, pp. 110a-113a; Appx. 40-42).

Plaintiff believes his report caused a chain reaction, with Gayle Johnson and Amber Boyk plotting to set him up for termination. (Appx. 15, pp. 86a-87a). Plaintiff admits that his only evidence to support this theory is speculation and his belief that everyone else he worked with was incompetent. (Appx. 15, pp. 75a-76a, 89a-90a, 97a). Boyk confirmed that she never considered Plaintiff's variance/concern report when she terminated Plaintiff; and the record demonstrates that neither Adams nor Johnson even knew that Plaintiff had filed a written report alleging that Johnson had killed Jack. (Appx. 17, pp. 118a-119a; Appx. 18, p. 129a).

[12] Boyk testified that she receives several variance/concern reports per week, and that she thinks it is a great idea for employees to bring issues forward so they can be addressed. (Appx. 17, p. 109a). In fact, nurses are required to file such reports if there are irregularities in patient care. (Appx. 17, p. 128a). Variance/concern report forms are freely available and employees or patients are never disciplined or treated differently because they file such reports. (Appx. 17, p. 127a).

[13] Human Resources' role is to provide recommendations to management to ensure consistent application of policies and to ensure that the ultimate discipline is based on the facts, rather than emotion. (Appx. 17, p. 127a). HR does not make clinical findings, but takes the clinical decisions of professionals at face value. *Id.*

III. ARGUMENT

A. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition *de novo* to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). To make this determination for a motion brought under MCR 2.116(C)(10), this Court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Id* at 120. Summary disposition will be affirmed only when no genuine issue regarding any material fact exists and the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*. Plaintiff cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact or show that there is some metaphysical doubt as to the material facts, but must present affirmative evidence to defeat a properly supported motion for summary disposition. *McCart v Thompson, Inc*, 437 Mich 109, 115 n 4; 469 NW2d 284 (1991). Failure to rebut evidence from the moving party that no genuine issue of material fact exists requires the trial court to grant summary disposition. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 725-726; 691 NW2d 1 (2005).

B. SUMMARY OF ARGUMENT

A public policy discharge claim **cannot** be based upon a violation of the Public Health Code because the Legislature – the sole decider of public policy in the State of Michigan – has determined that the ***exclusive*** remedy for violation of MCL 333.20176a is the Whistleblowers' Protection Act, MCL 15.361, *et seq.* Plaintiff did not bring his claim pursuant to the Whistleblowers' Protection Act, nor can he because he admits that did not fulfill the

requirements of making a report pursuant to MCL 333.20176a and because he did not file his complaint in the requisite time period.

The fundamental jurisprudential question presented in this case is whether Michigan courts are permitted to create public policy wrongful discharge claims that they believe serve the public interest even where the Legislature has provided an exclusive statutory remedy for alleged wrongful discharge, in a manner that undermines established Supreme Court precedent, erodes at-will employment and where the Legislature has never provided a basis for such claims.

At the outset, Michigan common law is that all employment is at-will unless there is a just-cause contract between the employer and employee that changes at-will status. In *Suchodolski v Mich Consol Gas Co*, 412 Mich 692; 316 NW2d 710 (1982), the Michigan Supreme Court reiterated this fact. It also concluded that the Legislature can limit the power of employers to carry out at-will terminations, and that employers who violate legislatively created public policy can be sued for wrongful discharge. *Suchodolski* set forth three narrow exceptions where public policy wrongful discharge claims can exist: (1) where explicit Legislative statements prohibit discharge of employees who act in accordance with a statutory right or duty; (2) where the employer discharges an employee for failure or refusal to violate the law; or (3) where the employee is discharged because he exercises a right conferred by a well-established legislative enactment. In *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993), the Supreme Court eliminated the first exception by holding that the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, and there is no other remedy. It is into this regime that *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002), injects the further clarification that only the Legislature has the authority to say what conduct violates public policy.

In *Terrien*, the Supreme Court further reined in the ability of lower courts to create or

identify public policies that individual judges thought were worthy of furtherance, thereby protecting the at-will employment doctrine. *Terrien* held that only the Legislature may create Michigan's public policy, and that the judiciary's focus must be on policies that have, in fact, been adopted through legal processes and are reflected in the state and federal constitutions, statutes and common law. This Court further emphasized in *Terrien* that Michigan public policy is *not* merely the equivalent of the personal preferences of one particular judge or a majority of an appellate court, that such a policy must be clearly rooted in the law and that there is no other proper means of ascertaining Michigan public policy.

Although the Court of Appeals cited to *Suchodolski*, *Dudewicz* and *Terrien* in its Published Opinion, it reached a result directly contrary to them, appellate case law, and the unambiguous legislative history of the Michigan Public Health Code, when it concluded that the Michigan Public Health Code, which already proscribes retaliatory discharge **and** provides an exclusive remedy for violation of the proscription, was the statutory basis for Plaintiff's public policy wrongful discharge claim, even though it found Plaintiff did not even act pursuant to that statute. *See, infra, Parent v Mount Clemens Gen Hosp*, 2003 WL 21871745, *3 (No 235235) (Mich App August 7, 2003); Legislative History of Section 20176 and 20180. Other decisions that have examined the Public Health Code, or similar public policy claims based on internal reports of alleged wrongdoing, have concluded that no public policy wrongful discharge claim exists. Section III.C.3.c. *infra*. To justify a contrary result, the Court of Appeals engaged in the very balancing of priorities and policy-weighing that *Terrien* does not permit courts to engage in, and that only the Legislature has the power to do. By employing its own discretion, the Court of Appeals has *de facto* overruled *Terrien*. The Court of Appeals' Published Opinion also recognized that Plaintiff did not engage in protected activity under the Michigan Public Health Code, but nevertheless somehow found that the same statute could be the basis of a wrongful

discharge claim. This is a dangerous precedent, as it provides support for future public policy wrongful discharge claims based upon statutes that claimants never acted pursuant to. This approach also violates the rule of *Smith v. Globe Life*, 460 Mich 446; 597 NW2d 28 (1999), where the Michigan Supreme Court found that a plaintiff cannot repackage or apply a creative label to his claim to circumvent the Legislature's unambiguous bar of relief under a statute and thereby avoid dismissal of his claim.[14] The fact is that Plaintiff did not even engage in protected activity under section 20176a of the Public Health Code and the ***exclusive*** statutory remedy for an alleged violation of that statute is the Whistleblower Protection Act, which makes his Complaint untimely. *See* MCLA 333.20180(1), *Parent*, supra. Plaintiff cannot avoid this result.

If allowed to stand, the Court of Appeals' Published Opinion will move the state of the law back into the world created by *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980), which allowed virtually every termination to be challenged in a lawsuit, and which has been corrected by the Michigan Supreme Court. The Court of Appeals' Published Opinion means that every terminated employee, armed with a clever lawyer who is good at deriving ad hoc public policy that might catch the eye of a lower court judge, could obtain a successful wrongful discharge jury verdict even when they cannot establish the *prima facie* elements of a claim under the statute they claim was violated. The Legislature can determine just what the costs of this new approach will be to jobs and growth, and to determine if it is worth doing notwithstanding such costs. Pursuant to *Toussaint*, Courts are poorly-suited

[14] In *Smith*, the Michigan Supreme Court held that when the Legislature said that transactions or conduct "specifically authorized" by law are exempt from the Michigan Consumer Protection Act, it intended to include conduct the legality of which is in dispute, and that the relevant inquiry is not whether the specific misconduct alleged by plaintiffs is "specifically authorized." Instead, the relevant inquiry is whether the general transaction is authorized by law, regardless of whether the specific alleged misconduct is prohibited. *Smith*, 460 Mich at 465-66.

to such evaluation.

The Court of Appeals' Published Opinion at issue here places *Terrien, Suchodolski, Dudewicz, Smith* and the at-will employment doctrine at risk of being undone. *Terrien* cut down drastically on the potential creators of public policy, whose declarations of what public policy is would trump the common law. *Dudewicz* held that a discharge in violation of public policy claim could not exist where a statute provides a specific remedy that did not exist in the common law. It is this narrowing that the Court of Appeals' Published Opinion attacks by expanding the number of potential public policy "creators" to include judges. The Opinion so hollows out *Terrien and Dudewicz* that the bar is likely to conclude that they have effectively been overruled, and it may act as a signal that lower courts can challenge or chip away at superior precedent.

The Court of Appeals' Published Opinion requires correction. Allowing the Published Opinion to stand will embolden other courts to follow a similar path, open the floodgates to public policy wrongful discharge claims being asserted every time a discharged employee believes his or her termination is unfair, and will have the effect of nullifying the at-will employment doctrine in Michigan, which the Michigan Supreme Court has carefully sought to preserve in its post-1980 decisions.

C. PLAINTIFF CANNOT MAINTAIN A WRONGFUL DISCHARGE CLAIM FOR VIOLATION OF PUBLIC POLICY UNDER THE PUBLIC HEALTH CODE, MCL 333.20176a(1)(a)

1. Only The Legislature Can Create Public Policy

To strictly curb a flood of decisions wherein courts stepped into the province of the Legislature and engaged in the creation of public policy, the Michigan Supreme Court issued a significant and far-reaching decision in *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002). At issue was whether covenants against the operation of day care centers in residential settings were unenforceable as against Michigan public policy. The Supreme Court took great pains to

provide clarification and guidelines as to how a court should ascertain the public policy of the state. It held that the adjudication of public policy claims is not simply a means to implement social policies based upon the preferences of judges:

> In defining "public policy," it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of subjective views of individual judges … As a general rule, making social policy is a job for the Legislature, not the courts … public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. *Id.* at 66-68.

The Supreme Court also found that the "responsibility for drawing lines in a society as complex as ours – of identifying priorities, weighing the relevant considerations and choosing between competing alternatives – is the Legislature's, not the judiciary's." *Id* at 67, *citing Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999).

2. Standards Applicable To A Public Policy Discharge Claim

The Michigan Supreme Court set forth the applicable standard for public policy wrongful discharge claims in *Suchodolski v Mich Consol Gas Co*, 412 Mich 692; 316 NW2d 710 (1982). At the outset, *Suchodolski* reiterated that the common law is that all employment is at-will unless there is a just-cause contract between the employee and employer that affirmatively changes at-will status. In other words, *Suchodolski* did not create at-will employment, it recognized that at-will employment is the default position under the common law unless the parties modified that position by contract. Next, *Suchodolski* recognized that the Legislature can limit the power of employers to carry out at-will terminations, and that employers who violate legislatively created public policy, such as discharging employees in violation of civil rights statutes, can be sued for wrongful discharge. *Suchodolski*, 412 Mich at 695.

Given the very significant statutory protections against unlawful terminations already

given to Michigan employees that did not exist at common law, such as the Elliott-Larsen Civil Rights Act, the Michigan Persons with Disabilities Civil Rights Act and Whistleblowers' Protection Act, the public policy exception to at-will employment is necessarily very limited. This narrow exception arises under three limited circumstances: (1) where explicit legislative statements prohibit discharge of employees who act in accordance with a statutory right or duty; (2) where the employer discharges an employee because the employee fails or refuses to violate the law; or (3) where the employee is discharged because he exercises "a right conferred by a well-established legislative enactment." *Suchodolski*, 412 Mich at 695-696; *Edelberg v Leco Corp*, 236 Mich App 177, 183; 599 NW2d 785 (1999) (declining to expand *Suchodolski*). The Michigan Supreme Court has never expanded these three limited exceptions, and has never authorized lower courts to expand or create new exceptions to the at-will employment doctrine.

The first and third *Suchodolski* prongs require a plaintiff to identify a specific legislative enactment supporting his claim. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 483-487; 516 NW2d 102 (1994). But the first *Suchodolski* exception has essentially been eliminated by *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993), *overruled in part on other grounds* 478 Mich 589 (2007), see *infra* Section III.C.3.a. The third *Suchodolski* prong additionally requires a plaintiff to establish, among other things, that he exercised a right conferred by a well-established legislative enactment. *Turner v Munk*, 2006 WL 3373090 (No 270532) (Mich App, Nov 21, 2006) (Appx. 43). The statute identifying a public policy under either prong must provide direct employment rights, *i.e.*, it must prevent discharge for protected activity. *Suchodolski*, 412 Mich at 696; *Psaila v Shiloh*, 258 Mich App 388, 392; 671 NW2d 563 (2003); *Zub v Wayne County Comm'n*, 1997 WL 33344618 (No 192641) (Mich App, Sept 9, 1997) (Appx. 44); *Grant v Dean Witter Reynolds, Inc*, 952 F Supp 512, 515 (ED Mich 1996); *Edelberg*, 236 Mich App at 181; *Friend v Village of North Branch*, 2005 WL 599705 (No

251415) (Mich App, Mar 15, 2005)(Appx. 45); *Regan v Lakeland Regional Health System*, 2001 WL 879008, *1 (No 223491) (Mich App, Aug 3, 2001) (Appx. 46).

3. The Court Of Appeals Recognized The Applicability Of *Suchodolski* But Failed To Correctly Apply It

As set forth more fully below, the Court of Appeals' Published Opinion requires reversal because it did not identify any statute that actually conferred a public policy right of action on Plaintiff, as required by *Suchodolski*.

a. The Court Of Appeals Improperly Concluded That Plaintiff Established A Claim Under The First Suchodolski Exception

As noted above, *Suchodolski*'s first exception is met where explicit legislative statements prohibit the discharge of employees who act in accordance with a statutory right or duty. Notwithstanding that Plaintiff never advanced a claim under the first *Suchodolski* exception and admitted he had no such claim, and that the Saginaw County Trial Court never held that Plaintiff had met the first *Suchodolski* exception, the Court of Appeals nevertheless concluded that Plaintiff had done so. (Appx. 11, p. 50a) (wherein Plaintiff states "[i]n the instant case, however, there is no applicable statutory prohibition")[15]; (Appx. 8, p. 24a).

In reaching this conclusion, the Court of Appeals committed a serious error by ignoring, and issuing a ruling contrary to *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993), *overruled in part on other grounds* 478 Mich 589 (2007), and *Pompey v General Motors Corp*, 385 Mich 537, 552-53; 189 NW2d 243 (1971). The Supreme Court held that, as a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, and there is no other remedy. *Dudewicz*, 443 Mich at 78, *citing Pompey*, 385

[15] In and of itself, this required dismissal of Plaintiff's public policy claim. *Riopelle v Walls*, 1999 WL 33440910 (No 205368) (Mich App, June 29, 1999) (Appx. 47); *Kunkler v Global Futures & Forex Ltd*, 2004 WL 2169071 (No 245561) (Mich App, Sept 28, 2004) (Appx. 48).

Mich at 552-53. Thus, where a statute prohibits retaliatory discharge and confers upon a victim of retaliation the right to sue, that person may not also assert a public policy claim. *Pompey* similarly held that remedies provided by statute for violation of a right having no common-law counterpart are exclusive, and there is no other remedy permitted.[16] Michigan Courts have held that *Dudewicz* essentially eliminated the first *Suchodolski* exception.[17] *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481; 516 NW2d 102 (1994); *Garavaglia v Centra, Inc*, 211 Mich App 625, 630; 536 NW2d 805 (1995). As such, while the Legislature may properly identify public policy, a discharge in violation of which would create a claim under *Suchodolski*, it is equally clear that such a claim may not be based upon a statute that provides specific rights and remedies because those statutory rights are exclusive, not cumulative. Were this not the case, every at-will employee alleging that his discharge violated a statute, such as the Elliott-Larsen Civil Rights Act, would also have a parallel viable public policy claim on the basis of the same statute even if they could not prove a *prima facie* Elliott-Larsen Civil Rights case. This is not the law.

Despite these two controlling Supreme Court cases, the Court of Appeals held that the Michigan Public Health Code, at MCL 333.20176a, contained a specific prohibition against the discharge of employees who report violations of the Code. (Appx. 8, p. 24a)("As to exception (1), MCL 333.20176a contains an explicit legislative statement prohibiting discharge or discipline of an employee for specific conduct"). The Court of Appeals also acknowledged that the Michigan Public Health Code specifically incorporated the Whistleblowers' Protection Act

[16] Michigan common law has never provided individuals who believe they have been terminated in retaliation for complaints with the right to file a private action. That right was created by the Michigan Whistleblowers' Protection Act.

[17] Consistent with this, Plaintiff conceded below that a viable public policy wrongful discharge claim cannot be made under the first *Suchodolski* exception. (Appx. 19, pp. 49a-50a). As for the second exception, Plaintiff admits he was never asked to violate the law, and was not terminated for refusing to violate the law. (Appx. 12, pp. 54a-55a).

as a remedy for those who experience retaliatory discharge for making complaints, see MCLA 333.20180(1). (Id., p. 25a). Given these findings, the Court of Appeals was bound by *stare decisis* to apply controlling prior Supreme Court precedent in *Dudewicz* and conclude that Plaintiff had no viable public policy wrongful discharge claim under the first *Suchodolski* exception. *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000)(*stare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, and contributes to the integrity of the judicial process); *Petersen v Magna Corp*, 484 Mich 300, 314-15; 773 NW2d 564 (2009). Instead, the Court of Appeals ignored controlling precedent and engaged in serious and reversible error by concluding that Plaintiff could state a public policy claim under that exception. (Appx. 8, p. 24a).

But the Court of Appeals went even further. In its Published Opinion, it also erroneously concluded that "Exception (1) has been found to apply to the Whistleblowers' Protection Act" and "has also been found to apply the Elliott-Larsen Civil Rights Act." (Appx. 8, p. 24a). The Court of Appeals erroneously cited *Suchodolski*, 412 Mich at 695, n2, where the Michigan Supreme Court stated that the Whistleblowers' Protection Act and the Elliott-Larsen Civil Rights Act were exceptions to the at-will employment doctrine:

> based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable. Most often these proscriptions are found in explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty. *Suchodolski*, 412 Mich at 695.

This Court in *Suchodolski* did not state that these statutes were independent sources of claims for discharge in violation of public policy – rather, that the Legislature has, over time, limited at-will terminations based upon explicit legislative statements. But the Court of Appeals interpreted this statement to conclude that these statutes were, in fact, exception (1) *Suchodolski* claims. In other words, the Court of Appeals ostensibly authorized employees who believe

they've been terminated based upon their race, but who cannot establish a *prima facie* claim under the Elliott-Larsen Civil Rights Act, to bring public policy wrongful discharge claims based upon the very same circumstances giving rise to their unsuccessful statutory claims. This holding is directly contrary to *Dudewicz.* Because the Court of Appeals' decision is published, it can readily be cited by future litigants as support for public policy claims where none should exist, or have ever existed. This would mark a significant encroachment on at-will employment and the effective overruling of years of established Michigan Supreme Court precedent. The only method of preventing this from occurring is reversal.

In response to Healthsource's argument that the first prong of *Suchodolski* was eliminated by the Michigan Supreme Court in *Dudewicz*,[18] Plaintiff is likely to claim that Healthsource is "incorrect as to the facts of this case" because in *Dudewicz*, the plaintiff had a viable claim under the Whistleblowers' Protection Act, whereas in the instant matter, Plaintiff did not have a viable Whistleblowers' Protection Act claim because he did not engage in protected activity. In other words, Plaintiff contends that he should receive a public policy claim as a consolation prize for a failed whistleblower claim. Plaintiff, like the Court of Appeals, misinterprets *Dudewicz's* holding.

In *Dudewicz*, this Court explained that in determining the availability of a public policy claim, the key factor is not whether the plaintiff can make out a *viable* prima facie claim under a given statute; but rather, whether the given statute generally provides an *available remedy* for the statutorily prohibited conduct. *Dudewicz*, 443 Mich at 79 (holding that the central issue in

[18] Plaintiff may incorrectly argue that *Dudewicz* was overruled by *Brown v Mayor of Detroit*, 487 Mich 589; 734 NW2d 514 (2007). Although it is true that this Court in *Brown* disapproved of certain dicta in *Dudewicz* and overruled other cases relying on that dicta, the Court did not overrule the holding of *Dudewicz* which is at issue in this case. *See, e.g., Segue v Wayne County*, 2014 WL 2154976 (No 310282, 310499) (Mich App, May 22, 2014) (unpublished) (Appx. 49).

determining whether a public policy claim is available is the "existence of the specific prohibition against retaliatory discharge" in the statute). As *Dudewicz* noted, cases in which Michigan courts have sustained a public policy claim do not involve statutes that specifically proscribe retaliatory discharge. *Id.* at 79-80. Where, however, the statutes involved prohibited such discharges, Michigan courts have consistently denied a public policy claim. *Id.* Based on this reasoning, this Court in *Dudewicz* held that:

> A public policy claim is sustainable, then, only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue. As a result, because the WPA provides relief to [plaintiff] for reporting his fellow employee's illegal activity, his public policy claim is not sustainable.

Id. at 80. Because the presence of *available* relief in a statute, not its viability, precludes relying on that statute for a public policy wrongful discharge claim, Plaintiff's argument that he was not protected under the Whistleblowers' Protection Act because he did not make a report that would trigger the provisions of the act is irrelevant.[19] The fact that he did not act in accordance with the exclusive remedy provided by the Public Health Code is a fact that he admits, and a fact that dooms his claim. In other words, Plaintiff's failure to act in accordance with the exclusive remedy does not give him greater rights (*i.e.*, through a public policy wrongful discharge claim) than someone who did act in accordance with that remedy, and his failure does not grant him a public policy claim as a consolation prize.

Pursuant to MCL 333.20180(1) of the Public Health Code, the Legislature has granted employees protection from retaliatory discharge by incorporating the Whistleblowers' Protection

[19] Plaintiff may try to leverage a public policy claim based on the "Code of Ethics for Nurses with Interpretive Statements." This is exactly what *Terrien* outlawed as these are privately created standards and cannot, because of that, be the basis for a public policy claim. Indeed, even before *Terrien's* bright line rule, the *Suchodolski* court concluded that a private association code of ethics cannot establish the public policy for a public policy wrongful discharge claim. *Suchodolski*, 412 Mich at 696-97.

Act as a remedy when they make a "report or complaint including . . . a violation of this article." *See also, Parent*, 2003 WL 21871745 at *3, n1. Contrary to the Court of Appeals' Published Opinion, that is precisely what Plaintiff did when he reported the alleged malpractice of his coworker, albeit not to the correct party required by the statute. Therefore, the rule from *Dudewicz, supra*, applies to this case. Because the Legislature has adopted an exclusive remedy for a retaliatory discharge grounded on policy based on the Public Health Code, the Court of Appeals committed reversible error in imposing cumulative remedies in this situation. *See* Section III.C.4. *infra*.

b. The Court Of Appeals Improperly Concluded That Plaintiff Established A Claim Under The Third Suchodolski Exception

To come within the third *Suchodolski* exception, an individual must establish that they were terminated for exercising a right conferred by a well-established legislative enactment, and that statute must be one directed at conferring employment rights. *Suchodolski*, 412 Mich at 696; *Psaila v Shiloh*, 258 Mich App 388, 392; 671 NW2d 563 (2003); *Edelberg v Leco Corp*, 236 Mich App 177, 181; 599 NW2d 785 (1999).

The Court of Appeals relied upon tortured reasoning and illogical arguments to arrive at its conclusion that Plaintiff properly stated a public policy claim under the third *Suchodolski* exception. First, it concluded that MCL 333.20176a prohibited a health facility from discharging employees who complain about a violation of the Public Health Code. (Appx. 8, p. 24a). Second, it acknowledged – as it must – that the Public Health Code already incorporated the Whistleblowers' Protection Act to guard health facility employees who report or complain about violations of the Health Code, and that if Plaintiff had exercised his rights under the Public Health Code, he would have no viable public policy claim. *Id.*, p. 25a. Third, the Court of Appeals concluded that Plaintiff never reported a violation of the Public Health Code, and was

therefore permitted to proceed with a public policy wrongful termination claim. (*Id.*, p. 26a) ("However, plaintiff did not originate a report or complaint of a violation of the Public Health Code; he accused a co-worker of malpractice") (emphasis added).[20]

In other words, the Court of Appeals concluded that although Plaintiff never reported a violation of the Public Health Code in accordance with its requirement, the Code could nevertheless serve as the basis for his public policy wrongful discharge claim despite the Legislature's selection of the Whistleblowers' Protection Act as the exclusive remedy for its violation. This non-sequitur argument, based on creative labelling and the repackaging of conduct, does not justify the Court of Appeals' conclusion. Moreover, in enacting section 20176a, the Michigan Legislature intended to protect workers who make *public* reports of violations of the Public Health Code to "proper authorities" – not internal reports like the one Plaintiff made here. *See Parent v Mount Clemens Gen Hosp*, 2003 WL 21871745, *3, n 1 (Mich App, Aug 7, 2003)(Appx. 51), Section III.C.4. *infra*.

Aside from this, the Court of Appeals failed to acknowledge that the Public Health Code does not govern medical malpractice – those standards are set forth by the Legislature at MCL 600.2912, *et seq*., and that statute unquestionably does not confer employment rights, and

[20] Even assuming for the sake of argument that *Suchodolski* authorizes a public policy claim under these circumstances (it does not), the Court of Appeals failed to consider that Plaintiff never demonstrated that his coworker engaged in malpractice. In a January 23, 2014 unpublished decision, the Court of Appeals refused to recognize a public policy cause of action based upon medical malpractice, characterizing that claim as "a new public policy-based claim premised on medical malpractice standards." *McIntire v Michigan Inst of Urology*, 2014 WL 265519 (No 311599) (Mich App Jan 23, 2014) (Appx. 50). The *McIntire* panel explained that the standard of care in the medical profession is "not based on any objective legal source, but must be established through expert testimony on a case by case basis." *Id* at *6, *citing Gonzalez v St John Hosp & Medical Ctr (On Reconsideration)*, 275 Mich App 290, 294; 379 NW2d 392 (2007). Although *McIntire* examined a claim under the second *Suchodolski* exception, its reasoning is nonetheless applicable here because it goes to the heart of what is, and what is not, objective public policy as created by the Legislature.

therefore cannot be the basis for a public policy wrongful discharge claim. Given this, the Court of Appeals should have concluded that dismissal of Plaintiff's claim was required. *See* Section III.C.4, *infra*.

The Court of Appeals' Published Opinion turns *Suchodolski* on its head, and effectively grants Plaintiff, and potentially hundreds and thousands of other litigants who come after him, the right to bring public policy wrongful termination claims without fitting the very narrow parameters for such claims set forth by the Supreme Court. Reversal by the Supreme Court is required to correct the Court of Appeals Published Opinion that straddled the line between two very different statutes to craft a public policy wrongful discharge claim where none previously existed, and, crucially, the Legislature had never created one.

c. Analogous State And Federal Court Decisions Hold That Under Michigan Law, There Can Be No Public Policy Claim Based On Internal Reports Of Misconduct

The Court of Appeals also erred by failing to consider that, as a matter of law, an internal report of misconduct is insufficient to form the basis of a public policy claim. The Michigan Supreme Court and Court of Appeals have affirmed the dismissal of a public policy claim where a plaintiff alleged he was terminated for internally reporting suspected misconduct. *Suchodolski,* 412 Mich at 694-95; see also *Gilmore v Big Brother/Big Sisters of Flint, Inc*, 2009 WL 1441568, *1-3 (No 284704)(Mich App, May 21, 2009)(affirming dismissal of public policy claim where plaintiff claimed she was terminated because she confronted her employer about its hire of a convicted felon in violation of company policy, and her supervisor's payment of a personal cell phone bill with company funds) (Appx. 52).

The Sixth Circuit and Eastern District of Michigan have reached the same conclusion. *See Cushman-Lagerstrom v Citizens Ins Co*, 72 Fed Appx. 322, 328 (6th Cir 2003) (Appx. 53) (holding that, under Michigan law, "[n]o public policy cause of action exists for a retaliatory

discharge of an employee who reported alleged violations of law to a superior."); *Scott v Total Renal Care, Inc*, 194 Fed Appx. 292 (6th Cir 2006)(Appx. 54) (affirming dismissal of public policy claim where plaintiff generally alleged, as here, that she was discharged in retaliation for reporting suspected violations of law to her superiors); *Harder v Sunrise Senior Living, Inc*, 2009 WL 5171843, *1-3 (No 09-11094) (ED Mich, Dec 22, 2009) (Appx. 55); *Golfaden v Wyeth Laboratories, Inc*, 2012 WL 1676664 (No 10-1799) (6th Cir, May 14, 2012) (affirming *Cushman-Lagerstrom*) (Appx. 56).

In *Harder*, the plaintiff claimed that she was terminated from her job because she internally reported that a coworker nurse unlawfully dispensed Vicodin to a patient, and that the defendant was concerned that plaintiff would also report that dispensation to the State of Michigan. *Harder*, 2009 WL 5171843 at *1. The Eastern District of Michigan concluded that a public policy claim under Michigan law cannot be based on internally reporting alleged unlawful conduct to a supervisor, and that even if plaintiff was terminated for doing so, "there is no authority that holds that such a termination is a violation of the public policy doctrine." *Id* at *3, *citing Scott*, 194 Fed Appx. 292.

These decisions are fully consistent with Michigan Supreme Court precedent and, unlike the Court of Appeals here, recognize that Michigan courts are not permitted to expand the public policy doctrine beyond the three exceptions identified by the Michigan Supreme Court.

4. The Whistleblowers' Protection Act, MCL 15.361, *et seq*, Provides The Exclusive Remedy For A Claim Of Wrongful Discharge Under MCLA 333.20176a(1)(a) And 333.20180(1)

a. The Court Of Appeals' Published Opinion Violates The Plain Language Of MCLA 333.20176a And 333.20180(1) And The Intent Of The Legislature

Shortly after the decision in *Terrien*, the Court of Appeals had an opportunity to address the exact question presented here – whether a public policy termination claim could be based on

the Public Health Code. It properly concluded that no public policy claim can be based on MCL 333.20176a because the exclusive remedy provided by the Public Health Code is the Whistleblowers' Protection Act in MCL 333.20180(1). *Parent*, 2003 WL 21871745, *3 (Appx. 51).

Section 20176a is part of Article 17 of the Public Health Code governing health facilities and agencies. Included among the numerous and comprehensive provisions of Article 17 are three provisions pertinent to this case:

- Section 20176, which provides individuals with a right to make reports to the department of public health regarding alleged violations of the code;
- Section 20176a, quoted above, which prohibits a health care facility from, *inter alia*, discharging an employee who makes such a report; and
- Section 20180, which provides the remedy for a violation of section 20176a, specifically, the Whistleblowers' Protection Act, MCLA 15.36, *et seq*.

Thus, Article 17 of the Public Health Code defines what constitutes protected activity in section 20176 as reports to the department of public health; provides protection to employees who make such reports in section 20176a; and, in section 20180(1), provides a remedy for a violation of the statutory protection by specifying that individuals who make reports are protected by the Whistleblowers' Protection Act.

It is undisputed that Plaintiff never filed a complaint or report with the department of public health regarding nurse Gayle Johnson. He admits that he did not engage in protected activity as defined by the very statute the Court of Appeals Published Opinion identifies and has no cause of action under that statute.

Nor can section 20176a provide a basis for a common law public policy claim. The Michigan Court of Appeals has made clear that no public policy claim can be based on MCLA 333.20176a because the exclusive remedy provided by the Public Health Code is the

Whistleblower's Protection Act. *Parent,* 2003 WL 21871745, *3 (Appx. 51).

In *Parent,* the plaintiff medical technician claimed that she was discharged in violation of public policy because she refused to perform a procedure that she claimed violated the medical standard of care. Like Plaintiff Landin in this case, the plaintiff in *Parent* made no report to the Department of Public Health prior to discharge, but premised her public policy claim on MCLA 333.20176a. The Court of Appeals held that because the Public Health Code provided both a specific protection against retaliation and a specific remedial provision to provide relief, no independent common law public policy right existed. In other words, the remedies provided by the statute itself were *exclusive*, not cumulative.

In reaching this decision, the Court relied extensively on the Michigan Supreme Court's decision in *Dudewicz,* 443 Mich at 78-80. The Court of Appeals quoted the Supreme Court as follows:

> As a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, not cumulative. *Pompey v General Motors Corp,* 385 Mich 537, 552-553; 189 NW2d 243 (1971). At common law, there was no right to be free from being fired for reporting an employer's violation of the law. *Covell v Spengler,* 141 Mich App 76, 83; 366 NW2d 76 (1985). The remedies provided by the WPA, therefore, are exclusive and not cumulative. *Shuttlesworth v Riverside Hosp,* 191 Mich App 25, 27; 477 NW2d 453 (1991).
>
> In *Suchodolski v Michigan Consolidated Gas Co, supra,* this Court recognized that there was an exception to the general rule that either party to an employment at will contract could terminate the agreement at any time for any or no reason. The exception is based on the principle that "some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id.* at 695. We also found that these restrictions on an employer's ability to terminate an employment at will agreement are most often found in explicit legislation. *Id.* The WPA is such legislation. *Id.*
>
> The existence of the specific prohibition against retaliatory discharge in the WPA is determinative of the viability of a public policy claim. In those cases in which Michigan courts have sustained a public policy claim, the statutes involved did not specifically proscribe retaliatory discharge. Where the statutes involved did proscribe such discharges, however, Michigan courts have consistently denied a public policy claim. Compare *Trombetta v Detroit, T & I R Co,* 81 Mich App 489;

> 265 NW2d 385 (1978) (the public policy claim was sustained where the defendant was discharged for refusing to manipulate and adjust pollution control reports), and *Sventko v Kroger Co*, 69 Mich App 644; 245 NW2d 151 (1976) (the claim was sustained where the defendant was discharged for filing a lawful workers' compensation claim), with *Covell v Spengler, supra* (the public policy claim was denied where the defendant also was sued under the WPA and the statute proscribed discharge in retaliation for the employee's complaints to the labor board concerning overtime pay), and *Ohlsen v DST Industries, Inc, 111 Mich App 580; 314 NW2d 699 (1981)* (the claim was denied where the employee also sued under MIOSHA provisions that prohibited discharge in retaliation for the employee's exercise of statutory rights). A public policy claim is sustainable, then, only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue. As a result, because the WPA provides relief to *Dudewicz* for reporting his fellow employee's illegal activity, his public policy claim is not sustainable. [Footnote omitted.]

Parent, 2003 WL 21871745 at *2 (quoting *Dudewicz*, 443 Mich at 78-80). Turning to the claim before it, the Court of Appeals in *Parent* then held:

> Here, plaintiff argues that an action for wrongful discharge based upon public policy is sustainable in light of MCL §333.20176a and 333.20521 of the Public Health Code, MCL §333.1101 *et seq.* We disagree. Pursuant to MCL §333.20180(1), the Legislature has granted employees protection from retaliatory discharge by incorporating the WPA as a remedy. Therefore, the rule from *Dudewicz, supra,* applies to this case. Because the Legislature has adopted an exclusive remedy for a retaliatory discharge grounded on policy based on the Public Health Code, we may not impose cumulative remedies in this situation.[FN1]
>
> FN1. Indeed, it appears that the Legislature incorporated the WPA as a remedy for a retaliatory discharge under the Public Health Code so that health care workers will report suspected abuses to the proper authorities to protect the general public.
>
> Accordingly, to the extent that the Legislature has protected health care workers under MCL §333.20176a and 333.20521, plaintiff's exclusive remedy for any alleged wrongful discharge predicated on the policies embodied in these statutes is to pursue a claim under the WPA. Plaintiff may not maintain an independent action grounded on public policy arising from the Public Health Code apart from the WPA [footnote omitted].

Parent, 2003 WL 21874745 at*3.

The conclusion that no public policy claim can be premised on section 21076a of the Public Health Code is fully consistent with the legislative history of that provision. In enacting

section 20176a, the Michigan Legislature intended to protect workers who make *public* reports of violations of the Public Health Code. The Legislature plainly had no such intent with respect to workers who, like Plaintiff, make only internal reports. As stated by the Court of Appeals in *Parent*, the Legislature wanted to encourage reports to the "proper authorities." *Id.* n 1. Thus, as the Court observed, "to the extent that the Legislature has protected health care workers under MCLA 333.20176a and 333.20521, plaintiff's exclusive remedy for any alleged wrongful discharge ***predicated on the policies embodied in these statutes*** is to pursue a claim under the WPA" *Id.* at *3 (emphasis added). *See also* Legislative Analysis of bills that amended MCL 333.20176a and §333.20180, which state that the bills would "protect heath facility or agency employees who report violations of the bill from civil and criminal liability under the Whistleblower's Protection Act (Public Act 469 of 1980)" and "would provide "whistleblower" protections for hospital employees who reported malpractice of a health professional" (Ex _); (*See* Legislative Analysis of House Bill 5829 (Appx. 57).

The plain language of MCLA 333.20176a and MCLA 333.20180 and the intent of the Legislature in amending the statutes is unambiguous. Plaintiff cannot base his public policy claim on MCLA §333.20176a of the Public Health Code. He did not engage in protected activity under that statute, and the remedial scheme created by the statute is *exclusive.* As a matter of law, no independent common law public policy right can be created. Although *Parent* carries no precedential weight because it is unpublished, the first axiom of a sound judicial system is similar outcomes for indistinguishable cases, whether published or not. Any other result visits unpredictability and irrational analysis on the citizenry. *Parent*'s logic is sound, fully consistent with controlling Supreme Court precedent and arrives at the same conclusion that the Court of Appeals was bound to reach, but did not, in this case. Given the foregoing, the Court of Appeals' Published Opinion must be reversed.

b. The Court of Appeals Cannot "Repackage" Plaintiff's Claim As An Alleged Violation of Public Policy Because It Is Barred By The Public Health Code And The Whistleblowers' Protection Act

The Court of Appeals' Published Opinion concludes that Healthsource would succeed if Plaintiff was simply reporting a violation of the Public Health Code, as the remedies provided by the Whistleblowers' Protection Act are exclusive (Appx. 8, p. 26a). The Court then erroneously concluded that Plaintiff did not in fact report a violation under the Public Health Code, and therefore there is no requirement to establish a claim of malpractice to show a violation of the Public Health Code.[21] Thus, the Court of Appeals Published Opinion concluded that Plaintiff was not limited to Whistleblower Protection Act remedies and could proceed with a *Suchodolski* claim. Broadly speaking, the Court of Appeals' Published Opinion recasts Plaintiff's actions by ignoring the overarching complaint Plaintiff engaged in, which it admits is subject to the Public Health Code, and relabeling it an alleged report of "malpractice." By this sleight of hand, the Court of Appeals thereby allowed Plaintiff to evade both *Suchodolski* and the Legislature's incorporation of the Whistleblower Protection Act as an exclusive remedy for Public Health Code violations.

Aside from being a circularly contradictory argument as noted above, to repackage Plaintiff's conduct to take it out of the realm of the Public Health Code, and thus outside of the exclusive remedy provision contained therein, is in violation of Supreme Court precedent in *Smith v. Globe Life*, 460 Mich 446; 597 NW2d 28 (1999). In *Smith*, the plaintiff wanted relief under the Michigan Consumer Protection Act ("MCPA") because the policy of credit life

[21] In any event, because there is a statute that governs malpractice and reports thereof, there is no claim for discharge in violation of public policy based upon a report of malpractice. *See supra* Note 20, *McIntire v Michigan Inst of Urology*, 2014 WL 265519 (No 311599) (Mich App Jan 23, 2014) (Appx. 50).

insurance that the defendant sold her was allegedly fraudulent, which plaintiff argued violated the MCPA. The defendant argued that the MCPA does not apply to any transaction or conduct authorized by a regulatory board or officer acting under specific statutory authority. MCL 445.904(1)(a). Because the policy in question had been approved by the Michigan Insurance Commissioner, the transaction in question was "specifically authorized" and the defendant argued it was therefore exempt from any action under the MCPA. Plaintiff argued that neither the statute nor the Michigan Insurance Commissioner "specifically authorized" the fraudulent practices committed by the defendant.

Agreeing with the defendant, Justice Young writing for the majority, the Michigan Supreme Court held that when the Legislature exempted transactions or conduct specifically authorized by law from the purview of MCPA, the result should be exactly what the Legislature stated. The relevant inquiry, the Supreme Court noted, is not whether the specific wrongful or underlying activity is *specifically* authorized, but whether the "general transaction" is specifically authorized by law. *Smith*, 460 Mich at 465. The plaintiff could not re-label the conduct at issue to avoid the simple fact that the transaction was authorized by the Michigan Insurance Commissioner and all such transactions are immune from liability under the MCPA. As such, there was no cause of action under the MCPA. *Id. citing Attorney General v Diamond Mortgage*, 414 Mich 603, 616; 327 NW2d 805 (1982) (instructing that the focus is whether the transaction at issue was authorized, not the specific alleged misconduct).

By relabeling the specific conduct that Plaintiff Landin allegedly engaged in as "malpractice" and not the overarching transaction that was expressly covered by the Public Health Code, the Court of Appeals' Published Opinion violates *Smith*. Confusingly, the Court of Appeals' Published Opinion acknowledges that the case is governed by the Public Health Code; indeed, the Published Opinion uses the statute as the basis for its *Suchodolski* claim. But at the

same time, the Published Opinion extricates Plaintiff's specific actions from the Public Health Code simply to avoid the exclusivity of the Whistleblowers' Protection Act. In doing so, the Court of Appeals relabeled Plaintiff's conduct to take it out of the realm of the Public Health Code, while acknowledging that the Public Health Code governs the transaction in question. Plaintiff, however, cannot have it both ways. Either he acted pursuant to the Public Health Code and the Whistleblowers Protection Act is his exclusive remedy, or he did not and the Code cannot serve as the statutory basis for his public policy claim. This illogical approach violates the exact type of creative labelling that *Smith* prohibited– a plaintiff cannot repackage his claim to ignore the intent of the Legislature simply because the statute that governs the transaction does not provide relief. If a plaintiff does not have relief based upon the unambiguous language of a statute and the Legislature's intent, then he does not have relief. Plaintiff Landin should not be permitted to backdoor his claim.

5. The Court Of Appeals Failed To Apply, And Thereby *De Facto* Overruled, *Terrien v Zwit* And Other Supreme Court Precedent

Courts are not free to ignore controlling Michigan law and instead pick and choose from other decisions that support their rulings. *See Petersen v Magna Corp*, 484 Mich 300, 314-15; 773 NW2d 564 (2009)(prior precedent may not be overturned or ignored based upon a mere belief that a case was wrongly decided). By declaring a new public policy claim where none previously existed under Michigan law, the Court of Appeals' Published Opinion effectively overturned *Terrien v Zwit* and many years of decisions following in *Terrien's* path.[22] *Terrien*

[22] *See, e.g., Smitter v Thornapple Twp*, 494 Mich 121; 833 NW2d 878 (2013)(public policy is not determined by what a majority of the Supreme Court believes is desirable at the time); *Woodman ex rel Woodman v Kera LLC*, 486 Mich 228, 247; 785 NW2d 1 (2010)(the reality of the limitations on our judicial institutions is a significant liability in courts' ability to make informed decisions when asked to create public policy by changing the common law); *Wells Fargo Bank, NA v Cherryland Mall Limited Partnership*, 295 Mich App 99; 812 NW2d 799 (2011)(the

provided lower courts with a firm and unambiguous ruling that "as a general rule, making social policy is a job for the Legislature, not the courts" and "public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Terrien v Zwit*, 467 Mich 56, 66-68; 648 NW2d 602 (2002).

Just three years after *Terrien*, the Michigan Supreme Court created a prudential doctrine cautioning judges not to venture into certain areas that are better left to the Legislature as they are more in the nature of political questions. *Henry v The Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005). There, appellants asked the Supreme Court to modify Michigan negligence law to permit the assertion of negligence claims where plaintiffs sought medical monitoring to screen for possible future, rather than present, injury. *Henry*, 473 Mich at 78. Plaintiffs alleged that Dow Chemical's plant on the banks of the Tittabawassee River discharged harmful chemicals into the soil, that those chemicals were known to cause health problems such as cancer, that they owned property in the vicinity and were therefore exposed to the chemicals, and that the court should implement a court-supervised medical monitoring program to screen them for future negative health consequences. *Id* at 69-70. The Supreme Court characterized plaintiffs' request as a proposal for a "transformation in tort law that will require the courts of this state – in this case and the thousands that would inevtibly follow – to make decisions that are more characteristic of those made in the legislative, executive and administrative processes." *Id* at 80.

Noting the potential undesirable externalities that such a course of action would create, the Supreme Court refused to grant plaintiffs' request "[b]ecause such a balancing process would necessarily require extensive fact-finding and the weighing of important, and sometimes

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Legislature makes public policy, not the courts).

conflicting, policy concerns" a task which is not suitable to resolution by the judicial branch. *Id* at 83-84. The Court held "there is a stronger prudential principle at work here: the judiciary's obligation to exercise caution and defer to the Legislature when called upon to make a new and potentially societally disclosating change to the common law." *Id* at 89; *see also* Young, *A Judicial Traditionalist Confronts The Common Law*, 8 Texas Rev. L. & Pol., 299, 307 (2004)(noting that common-law jurisprudence has been guided by an attempt to "avoid capricious departures from bedrock legal rules as such tectonic shifts might produce unforeseen and undesirable consequences"). Also underpinning the Supreme Court's decision was its analysis that "the Legislature has already created a body of law that provides plaintiffs with a remedy" and acknowledgment that creating a separate remedy would place the Court in competition with the Legislature and without the benefit of Legislative resources. *Id* at 92.[23] *Henry* also practically noted that, if it had held otherwise, it would have given *carte blanche* to "any moderately creative lawyer to identify an emission from any business enterprise anywhere, speculate about the adverse health consequences of such an emission, and thereby seek to impose on such business the obligation to pay the medical costs…" *Id* at 100.

In other words, *Henry* concluded the Legislature has the ability to determine whether new legal systems impose costs, and if the system is worth undertaking despite those costs. Courts are poorly-suited to such evaluations.

[23] Although the dissent in *Henry* claimed that the majority's Opinion left injured plaintiffs without a remedy, the majority cogently and correctly held that, assuming plaintiffs can show the four elements of a traditional negligence claim, plaintiffs could obtain full compensation for their injuries. *Id* at 98-99. This holding puts to rest any claim here that Plaintiff Landin lacked a statutory remedy because he did not plead or satisfy the standard for a *prima facie* Whistleblowers' Protection Act claim.

Although the Court of Appeals was required to follow the holdings and principles outlined in *Terrien* and similar decisions, and the prudential warning of *Henry*, it instead did exactly what those decisions state it could not do: it engaged in a comparison of competing interests in the process of fashioning a new public policy. That the Court of Appeals did so is transparently evident where it stated:

> The workers' compensation statutes and MCL 333.20176(a) share the same underlying purpose-- to promote the welfare of the people in Michigan as it concerns health and safety. While the workers' compensation statutes were admittedly enacted specifically in the context of protecting employees who are injured in the workplace, **it could be argued that** reporting malpractice in the context of a medical workplace would have even more of a direct impact on the health and welfare of our citizens and that the right to report alleged malpractice in one's workplace without fear of repercussion **is of at least equal if not of greater significance** than benefitting and protecting victims of work-related injuries. (emphasis added).

(Appx. 8, p. 25a)(emphasis added). Where the Plaintiff has no viable public policy claim under *Suchodolski*, the Court of Appeals' decision to draw lines, identify priorities, weigh relevant considerations and choose between competing alternatives, which is the sole province of the Legislature, must be addressed and corrected by the Supreme Court. *Terrien*, 467 Mich at 67; *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999). Although undoubtedly well-intentioned, the path the Court of Appeals chose is exactly the road that *Terrien* stated trial courts cannot take. Given that the Court of Appeals' Opinion is published, Plaintiff in this case will assuredly not be the last person to rely on it, and any moderately creative lawyer could use that Opinion to identify some statute to support an analogous public policy claim that does not exist at common law and has never been authorized by the Legislature or Supreme Court. This situation could repeat hundreds, or even thousands, of time in the future, creating a chaotic and dislocating effect on Michigan law and the at-will employment doctrine.

Instead of creating a public policy wrongful discharge claim where the Legislature has provided none, the Court of Appeals was obligated to follow the approach utilized by the Michigan Court of Appeals in *Psaila v Shiloh Industries, Inc*, 258 Mich App 388; 671 NW2d 563 (2003). There, plaintiff claimed he was fired in violation of public policy for exercising his right to receive commissions under the Michigan Sales Representative Act. Using *Terrien* as its starting point, the Court of Appeals affirmed the dismissal of plaintiff's public policy claim, finding that the Sales Representative Act imposed a duty on employers to pay commissions, "but nothing in the statute prohibits an employer from terminating a sales representative." *Psaila*, 258 Mich App at 393. The Court of Appeals also held that plaintiff's public policy claim failed because the statute contained no indication that the Legislature was at all concerned with preserving the employment relationship between the sales representative and the employer." *Id.* at 394. Similarly, in this case, the regulatory schedule governing the nursing profession contains no indication that it is intended to preserve the right of nurses to make internal reports so coworkers can receive education and counseling.

As things currently stand, *Terrien* and *Van* have effectively been hollowed out by the Court of Appeals' Opinion. For these reasons, reversal of the Court of Appeals' Opinion is required.

6. If Allowed To Stand, The Court Of Appeals' Opinion Will Erode The At-Will Employment Doctrine In Michigan

In 1980, the Supreme Court decided *Toussaint v Blue Cross & Blue Shield*, 408 Mich 579; 292 NW2d 880 (1980), a case in which two employees claimed they were terminated in violation of agreements promising them just-cause employment. Both employees claimed that their employers verbally promised them job security as long as they were doing their jobs. *Toussaint*, 408 Mich at 597. Among other things, the Supreme Court held that employment

contracts promising just-cause employment are enforceable, and that a provision promising just-cause employment may be incorporated into an employment contract by virtue of oral agreement or as the result of an employee's legitimate expectations based upon policy statements. *Id* at 598-99. In effect, *Toussaint* subjected virtually every at-will termination to judicial scrutiny, so long as the claimant could identify some small statement regarding their employment status.

In the wake of *Toussaint*, wrongful discharge and just-cause employment cases rapidly multiplied. Employees who could point to a scrap of a handbook, or a vague oral statement, could now claim entitlement to just-cause employment and judicial review of their terminations. This naturally worked to limit the application of at-will employment in Michigan. Just over a decade later, the Michigan Supreme Court limited the application of *Toussaint* when it decided *Rowe v Montgomery Ward*, 437 Mich 627; 473 NW2d 268 (1991)(holding that claims of just-cause employment founded on oral representations are only cognizable where the evidence demonstrates both employer and employee clearly intended to be bound) and *Rood v General Dynamics Corp*, 444 Mich 107; 507 NW2d 591 (1993)(concluding that to overcome the presumption of at-will employment in Michigan, an employee must submit evidence of a contractual agreement for a specific employment term, or a provision stating that the employee may only be discharged for just cause).

The Supreme Court's restoration of the at-will employment doctrine in Michigan, twenty five years in the making, is irreconcilable with, and has been firmly placed at risk by, the Court of Appeals' Published Opinion here. When fully appreciated, the Court of Appeals' Published Opinion carries with it the potential to reset Michigan law back to the immediate post-*Toussaint* world, when almost any employee had the opportunity to seek judicial review of his or her termination decision, and the term "at will employee" meant little in practice. The Court of Appeals' Published Opinion, however, is potentially more dangerous than *Toussaint* ever was.

Unlike with *Toussaint* claimants, those advancing public policy claims do not need to submit evidence of verbal statements or policy handbooks expressing an intent to promise employment for a definite term. Under the principles and conclusions announced in the Court of Appeals' Published Opinion, the bar is much lower: discharged employees can lay out their story in a judicial complaint and creative lawyers or sympathetic courts need only identify some statute bearing a tangential relationship to the Complaint to permit a jury to review the employee's termination. In short, nearly all terminations will be subject to judicial review and at-will employment – rather than public policy claims – will become the exception, not the general rule.

If, as a state, we are going to adopt this approach, then, as in *Henry v The Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005), where the Supreme Court was invited to create an equally-destabilizing medical monitoring doctrine, the Supreme Court ought to direct this Plaintiff to take his theory to the Legislature. The Legislature can and should determine just what the costs of this new approach will be to jobs and growth, and if it is worth doing notwithstanding the costs. Courts are poorly-suited to such evaluations. In short, if the people of the State of Michigan want to visit these consequences on their job providers, so be it, but it is wise for this Court to recognize, as in *Henry*, that it is best done not in a court but after a full and fair debate in the Legislature.

Healthsource anticipates that Plaintiff will continue to cite *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008), to contend that Healthsource somehow "waived" its arguments regarding *Toussaint*, because it never raised them below in the Court of Appeals. Plaintiff's argument is not supported by *Walters* and is otherwise illogical.

In *Walters*, the trial court granted the defendant's motion to dismiss the plaintiff's complaint based on the statute of limitations. On appeal, the plaintiff argued for the first time that the tolling provisions of the relevant statute required reversal. *Walters*, 481 Mich at 381.

The Court of Appeals affirmed the trial court, albeit on different grounds and declined to address plaintiff's tolling argument holding that it was unpreserved for appellate review. *Id.* Affirming the Court of Appeals, this Court similarly held that plaintiff waived the tolling provision argument by failing to raise it in the trial court. *Id.* at 390-91. Supporting its decision, this Court noted that the "principal rationale" for the waiver rule is "based in the nature of the adversarial process and judicial efficiency." *Walters*, 481 Mich at 388. Requiring litigants to raise and frame their argument in the trial allows their opponents to "respond to them factually" and "avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful." *Id.*

No such facts are present here. Healthsource did not raise its argument regarding *Toussaint* in the Trial Court (or Court of Appeals) because it did not have any reason to do so prior to the Court of Appeals' June 3, 2014 Published Opinion. It was that decision that precipitated this argument.

Plaintiff's failure to respond to the merits of Healthsource's *Toussaint* argument, on the other hand, is telling. As Healthsource argued in its Application for Leave, allowing the Court of Appeals' decision to stand in this case will, like *Toussaint*, erode the "at-will" employment doctrine in Michigan, which the Michigan Supreme Court spent the better part of twenty-five years repairing. This is so because every at-will employee who does not have a *viable* statutory wrongful discharge claim – as opposed to an *available* statutory remedy – will claim that the statute provides him/her with a public policy wrongful discharge case. In other words, if a whistleblower lacks a viable Whistleblowers' Protection Act claim because he filed it untimely, he will be able to rely on the act as the public policy supporting his wrongful discharge tort cause of action. Such an outcome would subject virtually every at-will termination to judicial scrutiny.

IV. CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Defendant-Appellant Healthsource Saginaw most respectfully requests that this Court: reverse the Published Opinion of the Court of Appeals and the Saginaw County Trial Court, grant either of Healthsource's Motions for Summary Disposition, or grant Healthsource's Motion for JNOV and determine that, under *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002), *Suchodolski v Michigan Consol Gas Co*, 412 Mich 692; 292 NW2d 880 (1982), and *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993), Plaintiff has no valid public policy wrongful discharge claim and that the Whistleblowers' Protection Act is the exclusive remedy for Plaintiff's who are discharged in violation of the Public Health Code, MCL 333.20176a.

Respectfully submitted,

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Dated: May 29, 2015

IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
PRESIDING JUDGE SERVITTO

ROBERTO LANDIN,

Plaintiff-Appellee,

v.

HEALTHSOURCE SAGINAW, INC.,

Defendant-Appellant

Supreme Court No. 149663

Trial Court No. 08-002400-NZ-3

Court of Appeals No. 309258

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CERTIFICATE OF SERVICE OF
DEFENDANT-APPELLANT'S BRIEF ON APPEAL
AND DEFENDANT APPELLANT'S APPENDIX
ORAL ARGUMENT REQUESTED

I hereby certify that on May 29th, 2015, I electronically filed Defendant-Appellant's Brief on Appeal – Oral Argument Requested, Defendant-Appellant's Appendix, and this Certificate of Service with the Clerk of the Michigan Supreme Court using the TrueFiling system, which will send notification of such filing to the following; I also certify that we have sent a copy of all via email as has been standard throughout this case, along with a hard copy in the US mail:

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